

## **EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
JOHN DOE #1-#5,

Plaintiffs,

vs.

5:18-CV-496

SYRACUSE UNIVERSITY, et al.,

Defendants.  
-----x

*Motion Argument - June 21, 2018*

James Hanley Federal Building, Syracuse, New York

HONORABLE FREDERICK J. SCULLIN, JR.

United States District Judge, Presiding

A P P E A R A N C E S

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1 THE CLERK: Case on for motion argument is John Doe  
2 #1-#5 versus Syracuse University, et al., 18-cv-496.  
3 Appearances for the record.

4 MS. FELTER: Karen Felter on behalf of the  
5 plaintiffs.

6 THE COURT: Ms. Felter.

7 MR. POWERS: John Powers on behalf of the  
8 defendants, Your Honor.

9 THE COURT: And Mr. Powers. Ready to proceed?

10 MR. POWERS: Yes, Your Honor.

11 THE COURT: Well, as you know, and perhaps the  
12 interns know as well, pending before the Court today are  
13 plaintiffs' motions for a preliminary injunction and for  
14 leave to file an amended complaint. These motions are  
15 brought by an order to show cause.

16 Let me address, first of all, the motion to amend  
17 the complaint. Mr. Powers, there is no real objection to  
18 this, is there, other than the fact that you have your own  
19 motions with respect to the plaintiff as set forth now as  
20 pending before Magistrate Judge Peebles, is that right?

21 MR. POWERS: Yes, Your Honor. As we stated, we  
22 believe there is an automatic right to amend as a right  
23 because we haven't answered yet. Our objection is that the  
24 plaintiffs haven't identified themselves yet, which is a  
25 requirement of Rule 10. That's our only objection to the

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1 amendment of the pleading as it is.

2 THE COURT: And that's pending before Judge  
3 Peebles, right?

4 MS. FELTER: Yes, it is, Your Honor. And I was  
5 going to add that after we received -- it was a cautionary  
6 measure to make the motion to amend and, frankly, I wasn't  
7 sure whether 15(a) would allow an amendment of right after 21  
8 days of service.

9 THE COURT: In any event, the Court will grant your  
10 motion to amend and the issue with respect to Mr. Powers'  
11 motion will be addressed by Judge Peebles, that will be  
12 resolved there. Okay.

13 MS. FELTER: Thank you, Your Honor.

14 THE COURT: That leaves the motion for a  
15 preliminary injunction. I have your submissions and have  
16 reviewed them. And do you wish to be heard further at this  
17 time?

18 MS. FELTER: I do, Your Honor.

19 THE COURT: You may proceed.

20 MS. FELTER: Should I stay here or do you want me  
21 to come up?

22 THE COURT: I'll tell you what, what's more  
23 comfortable?

24 MS. FELTER: It doesn't matter.

25 THE COURT: It's easier if you have the microphone

1 in front of you. Why don't you come up here and use that  
2 because the people in the back of the room want to hear what  
3 you have to say too.

4 MS. FELTER: Okay. So defense counsel is correct  
5 in describing the plaintiffs' --

6 THE COURT: Can you hear her back there? Okay.

7 MS. FELTER: -- in describing the plaintiffs'  
8 request for leave in this case as narrow. Specifically, the  
9 plaintiffs have sought release of their transcripts without  
10 the notation that was proposed by the University in a June 11  
11 e-mail from Eric Nestor. Specifically in that e-mail Nestor  
12 advised students at approximately 3:01 on Monday, June 11th  
13 that the Office of Student Rights and Responsibilities would  
14 be submitting paperwork to the Registrar's Office to have the  
15 Administrative Withdrawal - University Initiated notation  
16 placed on their academic transcripts. He advised the  
17 students that this should happen this week, indicating it had  
18 not yet been done. He said that after the notation was  
19 applied, the OSR office would then release the transcript  
20 holds.

21 So in the evidence that's been submitted in  
22 opposition to -- well, let me back up by saying, this present  
23 motion that we filed was filed 48 hours, approximately, after  
24 Mr. Nestor sent that e-mail, and that was in an attempt to  
25 prevent the University from marking the students' transcripts

1 prematurely at the time when the OSR office was, according to  
2 Nestor, in the process of requesting transcript notations.

3 So in opposition to our motion, the University has  
4 submitted an affidavit from Mr. Nestor, which has an exhibit  
5 from the Registrar's Office with data showing that the  
6 transcript holds were already in place -- I'm sorry, that the  
7 transcript notations were already in place when he sent that  
8 e-mail. So the Register's data shows that the transcript  
9 holds were released between 3:02 and 3:45 p.m. So the  
10 transcript holds obviously would not have been deleted if the  
11 transcripts were not already marked.

12 Consequently, Nestor's e-mail was disingenuous and  
13 misleading, since it's obvious that the students were not  
14 notified of the University's intention to add these notations  
15 until after the notations had already been made. So the  
16 University is now arguing that a higher standard of review  
17 applies to this motion.

18 THE COURT: May I interrupt you at that point in  
19 time? I think that's important to put this in context with  
20 what the real issue is here today.

21 For edification for those who are observing this,  
22 at a preliminary injunction the parties seeking it must  
23 establish irreparable harm, either likelihood of success on  
24 the merits or serious question on the merits, and a balance  
25 of hardships in favor of the moving party and the public

1 interest as well.

2 Here there is a dispute over whether this request  
3 for an injunction is a mandatory injunction or a prohibitory  
4 injunction. If it's mandatory, that means you wish to change  
5 the status quo. If it's prohibitory, that means you wish to  
6 keep it the way it is. So the issue becomes what is the  
7 status quo and when was it established. And that's what  
8 you're arguing against it right now, I gather?

9 MS. FELTER: More or less.

10 THE COURT: All right.

11 MS. FELTER: So, I mean, the point is they're now  
12 arguing that this higher standard should apply because then  
13 it would require removal of this mark from their transcript.  
14 But the fact of the matter is that the students were never  
15 afforded an opportunity to prevent the marking of the  
16 transcripts until after it had already been accomplished. So  
17 to the extent that the request that we're seeking can be  
18 deemed mandatory relief, that's entirely the fault of the  
19 University for not advising the students beforehand that it  
20 was planning to take this improper action. Because, as we  
21 argued in the motion papers, the notations -- I should say  
22 the effect of the decision is stayed pending an appeal.

23 So if the University is taking the position that  
24 they want to preliminarily release the transcripts, they  
25 can't do so with this notation pending the results of the

1 appeal.

2           The University's counsel is also correct in stating  
3 that plaintiffs did not address the likelihood of success in  
4 getting this Court to reverse the Conduct Board's decisions,  
5 and that is because no such claim for relief exists in this  
6 case. Contrary to the University's contentions that the  
7 plaintiffs have not requested that this Court overturn the  
8 Conduct Board's decisions because it has no jurisdiction to  
9 do so.

10           Instead, this case is about the University's breach  
11 of its contractual agreements with the students and  
12 defamation. Specifically, as referenced in the complaint,  
13 the students have a right of free expression limited only by  
14 the language of the student Code of Conduct which prohibits  
15 fighting words. And the conduct here was not fighting words  
16 because it was not directed at anyone outside of the  
17 fraternity, it was satire, and it did not cause an immediate  
18 breach of the peace. In fact, no one even knew that this  
19 incident had taken place until weeks later when the videos  
20 were improperly released by the Daily Orange from a private  
21 website.

22           The students here in this case also pursuant to the  
23 University's contract with them have a right to fundamental  
24 fairness in connection with any disciplinary action. The  
25 University argues that due process was afforded the



1 plaintiffs in the conduct proceedings, but this is frankly an  
2 argument for another day in a different forum. There is an  
3 administrative record of the disciplinary proceedings, and to  
4 quote the chairman of the Conduct Board, "that record will  
5 speak for itself in any Article 78 proceeding."

6           The University's argument about the process that's  
7 been afforded to the students fails to address the basic  
8 problem at issue in this case, which is these students never  
9 should have been charged with the violations outlined in the  
10 charging documents to begin with. Fundamental fairness in  
11 the disciplinary process has to include a prohibition against  
12 the University stretching and manipulating the Code of  
13 Conduct to penalize conduct that is not contemplated by the  
14 code.

15           Specifically, the plaintiffs have asserted that the  
16 conduct charges bear no relationship to the facts in the  
17 case, that is that they engaged in a satirical roast, which  
18 the University's own investigation found was voluntary, not  
19 offensive to anyone present, and did not involve violence,  
20 coercion or drugs and alcohol.

21           THE COURT: Ms. Felter, now you're really talking  
22 about the merits of the action now. Can we just focus on the  
23 preliminary injunction, what the status quo may be?

24           MS. FELTER: Sure. Absolutely. So -- I'll just  
25 move on here.

1 I think that it's important to understand that as  
2 part of -- I mean, if the students are required to show that  
3 they're likely to succeed on the merits of the case, then, of  
4 course, that goes to the question before the Court which is  
5 whether an injunction is proper.

6 THE COURT: And that's if the Court finds it's a  
7 prohibitory injunction, not a mandatory, because the  
8 mandatory injunction has to show that it's a clear and  
9 substantial likelihood of success.

10 MS. FELTER: Well, as I referenced, I think that at  
11 the time the facts that were available to the plaintiffs at  
12 the time that this motion was filed suggested that we were  
13 going to be preventing the University from marking  
14 transcripts and releasing the hold prematurely. As it turns  
15 out, that action had already taken place.

16 So the University is now arguing that this  
17 injunction has been transformed into a mandatory injunction  
18 by way of the fact that the markings on the transcripts have  
19 to be removed now. But as I said, that is entirely the fault  
20 of the University and not advising the students before they  
21 were taking this action that they were going to do so.

22 THE COURT: As I understand it, your position is  
23 the status quo that you're trying to preserve is before the  
24 markings took place.

25 MS. FELTER: Exactly.

1 THE COURT: So that would have been when?

2 MS. FELTER: Well, I mean, according to the  
3 University, they have the option of holding a transcript  
4 under any circumstances that require suspension. However,  
5 our position is that, you know, the --

6 THE COURT: They agreed to release the transcripts,  
7 they just want the markings to stay on the transcripts.

8 MS. FELTER: Right. Except that at this point they  
9 had no right to put the markings on the transcripts, because  
10 according to their own policy, any results of the hearing is  
11 stayed pending appeal. And so they are claiming that they're  
12 releasing the transcripts early as a favor to these students  
13 so that they can transfer. But, frankly, I think that's more  
14 about mitigating the damages that they've caused in this case  
15 by delaying improperly both the initial decisions on the  
16 disciplinary action, which took weeks and weeks,  
17 notwithstanding the fact that they said that it would be  
18 wrapped up very quickly, and then the delay in deciding the  
19 appeals, which according to their rules are supposed to be  
20 decided within three days of all submissions.

21 In this case the appeals were finalized and  
22 submitted completely as of June 8, and we still don't have a  
23 decision from the University, and they sent an e-mail saying  
24 that there was going to be a further delay. So that delay is  
25 preventing the students from getting a final resolution on

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1 this disciplinary action and authorizing them to then go and  
2 start an Article 78 proceeding where the impropriety of the  
3 procedures that were used would be an issue and their ability  
4 to get an injunction in that case.

5 THE COURT: I thought the appeal had already been  
6 taken and it was presently being considered?

7 MS. FELTER: Yes. But we have no idea when that  
8 appeal will be resolved and the Article 78 action cannot be  
9 started.

10 THE COURT: Until the decision?

11 MS. FELTER: Exactly. So there has been this  
12 inordinate delay which is cutting into the time that the  
13 students have to apply to other schools.

14 THE COURT: Well, the Article 78 proceeding will  
15 take some time too.

16 MS. FELTER: Absolutely.

17 THE COURT: So as a practical matter, if the  
18 notation stays on the transcripts until after the Article 78  
19 proceeding takes place, it's going to be long past the time.

20 MS. FELTER: Well, and the point is that, first of  
21 all, in the very first instance there is a possibility that  
22 the University will reverse the decisions of the Conduct  
23 Board in the appeal process, which, you know, the kids have  
24 the obligation to try to transfer now. Every day that goes  
25 by is another day that they're limited in their ability to

1 get their transfer applications in.

2 THE COURT: Well, the crux, as I understand it, is  
3 the notations on the transcripts, because the University has  
4 agreed to release the transcripts but with the notations.  
5 And your position is that the notations are additional of the  
6 matters that were put on after the status quo was met and you  
7 want to preserve the status quo, which is sometime before the  
8 notation. But do you have a date, time frame?

9 MS. FELTER: Well, as far as I know, up until  
10 June --

11 THE COURT: June 21st is what the --

12 MS. FELTER: June 21st, up until June 21st the  
13 University had been holding the transcripts. And pursuant to  
14 whatever policy that they claim, frankly, I think that, you  
15 know, we have argued the impropriety of that. But that the  
16 University was holding the transcripts, advised them in the  
17 afternoon on the 21st that it was going to put these  
18 notations on there and release the transcripts at some point  
19 during the week. But, in fact, the data from the Registrar's  
20 Office shows that they actually did mark the transcripts and  
21 release the holds before or at the same time that they sent  
22 that notice to the students.

23 So, you know, there is a possibility that the  
24 appellate board will reverse the determination of the Conduct  
25 Board, but in the meantime the students, they're caught

1 between a rock and a hard place. Do they wait weeks longer  
2 until the University issues this decision with the  
3 possibility that they could get a reversal, or do they accept  
4 a transcript now that's been released that has this mark on  
5 it that shouldn't be there because the process has not been  
6 completed?

7 THE COURT: Let me hear from Mr. Powers now, if I  
8 may. Mr. Powers, I believe you maintain that the hold date  
9 for plaintiffs' records is April 21st. Is that the notation  
10 date too?

11 MR. POWERS: No, it wasn't, Your Honor, and I  
12 believe I can explain.

13 THE COURT: All right.

14 MR. POWERS: Your Honor, as you mentioned, and I  
15 know you want to focus in on the precise issue in front of  
16 you, I want to emphasize that we're here on an equitable  
17 request before the defendants have even had the opportunity  
18 to answer this action. It's an extraordinary power that the  
19 Court has but it's only sparingly used. It's a high burden  
20 even if it's a prohibitory injunction.

21 What the plaintiffs are asking you to do is  
22 something different. They're asking you, and I'm going to  
23 tell you exactly what their argument is, but they're asking  
24 you to do two things they are not entitled to, to order two  
25 things that they are not entitled to. What they would like

1 to do is they would like to transfer from Syracuse University  
2 while this disciplinary process is pending and have a  
3 transcript, a clean transcript sent to the receiving  
4 university, the university that they're applying to, as if  
5 nothing had occurred and there was no discipline pending.

6 The theory behind that argument is that the  
7 University's not allowed to place a hold on the transcript.  
8 That's not the case. That's the factual predicate for their  
9 motion. They're talking about annotation but annotation is  
10 the secondary question. Because if their transcript is being  
11 held by the University and it's not released until the end of  
12 the process, in other words, after the appeal board rules and  
13 vice chancellor reviews the decision, that's when the  
14 transcript gets released. That's when in the ordinary  
15 circumstance the transcript is annotated.

16 THE COURT: Is that what you're stating is  
17 University policy?

18 MR. POWERS: Yes, it is, Your Honor. And I would  
19 like to make a specific record of that. Because it's been  
20 advanced by the plaintiff, who has the burden of clear and  
21 substantial evidence for a mandatory injunction, that the  
22 policy is that you can only hold a transcript on a Title IX  
23 charge, and there is no evidence of that. There has been no  
24 evidence presented of that.

25 What we've offered is testimony from the assistant

1 director of the Office of Student Rights and  
2 Responsibilities, that's the department responsible for  
3 administering student discipline, that it's the policy of the  
4 University in every student conduct case to hold the  
5 transcript. This makes good sense, Your Honor. And it goes  
6 to this public interest issue that we're going to talk about  
7 in a minute. That the students aren't allowed to apply and  
8 withdraw while they have disciplinary charges against them.

9 THE COURT: Apply and withdraw from the University?

10 MR. POWERS: To apply to another university,  
11 withdraw from Syracuse.

12 THE COURT: Is that set forth? They refer to  
13 registry I believe in the --

14 MR. POWERS: So the two policy statements that are  
15 contained on the website that Mr. Nestor refers to in his  
16 declaration, one is from the Office of Student Rights and  
17 Responsibilities web page, and it indicates that, "Staff from  
18 this office can place a hold preventing a student from  
19 attempting to register until any outstanding judicial actions  
20 are settled." It goes on to say, "Students with this hold  
21 should contact the Office of Student Rights and  
22 Responsibilities." It's not limited to Title IX charges;  
23 there is a hold for every judicial action.

24 The other section which is from the transcript page  
25 reads, "Transcripts are not released for students with



1 outstanding student conduct obligations." Again, not limited  
2 to a certain type of claim. And there is no principled  
3 reason to limit the hold to just one type of claim, Your  
4 Honor, because the rationale is that the student is not being  
5 forced to accept responsibility for their actions through the  
6 student disciplinary process and they're applying to a school  
7 that has no knowledge that they've committed some misconduct.  
8 It's bad for the student, it's bad for Syracuse, and it's bad  
9 for the receiving school.

10 Now I also want to draw your attention to Section  
11 15.1 in the student code.

12 THE COURT: Mr. Nestor's statements when he opines  
13 upon the policies are based upon that code, is that correct?  
14 The Student Conduct System Handbook is what he based upon?

15 MR. POWERS: The way I would describe it, Judge, is  
16 the policy is the policy. That it's the regular practice of  
17 the University to do so and that's corroborated on the  
18 website.

19 THE COURT: Is there a written policy?

20 MR. POWERS: Well, I'm about to get to that, Your  
21 Honor, I'm going to read it for you.

22 THE COURT: What are you reading from?

23 MR. POWERS: Section 15.1 of the student  
24 disciplinary.

25 THE COURT: I'm not clear.

1 MR. POWERS: It's Exhibit A, Judge, page 23.  
2 Exhibit A to Mr. Nugent's declaration. Read this for the  
3 record.

4 THE COURT: A student, University Student Handbook?

5 MR. POWERS: Yes.

6 THE COURT: Yeah, that's what I was asking you.  
7 That's what he is referring to as a source of information  
8 when he opines on the policy, right?

9 MR. POWERS: Well, he hasn't referred to this, Your  
10 Honor, but this is actually stating the policy. He doesn't  
11 reference this in his declaration but this is actually  
12 stating the exact same policy.

13 THE COURT: But that's where he draws his opinion  
14 from?

15 MR. POWERS: Yes.

16 THE COURT: Thank you.

17 MR. POWERS: It states, "A student who chooses to  
18 withdraw from the University rather than participate in the  
19 conduct process may be classified as having been withdrawn  
20 for disciplinary reasons. This status will be noted on the  
21 student's transcript as Administrative Withdrawal -  
22 University Initiated." That's exactly what happened here,  
23 Your Honor.

24 It goes on to state, "A student who withdraws under  
25 these circumstances may not receive a transcript," dot dot

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1 dot, "until the pending matter is resolved." It's not  
2 limited to certain types of claims; it's all claims.

3 And as I said, Judge, there is very good reasons  
4 why you do this. You've got to let the process run its  
5 course. It's not preventing these students from  
6 transferring. What it's preventing them from doing is  
7 transferring without accounting for their conduct at their  
8 prior university. If they're vindicated at the end of the  
9 process, great, the hold is released and their transcript is  
10 clean.

11 THE COURT: All right. But we're not talking about  
12 the hold now, we're talking about the notation on  
13 transcripts, right, you agreed to release them.

14 MR. POWERS: And what happened, Your Honor, is the  
15 University offered to treat these students differently. In  
16 other words, deviate from the policy and release the hold.  
17 But the condition of that release was that the annotation  
18 would be put on the transcript. And that is -- that  
19 annotation is exactly as is quoted in Section 15.1,  
20 Administrative Withdrawal - University Initiated.

21 Now what the meaning of that is, that's up to the  
22 dialogue between the transferring student and the target  
23 university. That's their issue to deal with with the school  
24 that they're transferring to.

25 THE COURT: Was there an agreement, though, here?

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1 MR. POWERS: I beg your pardon?

2 THE COURT: Was there an agreement? That's where  
3 you said it's based upon an agreement between the university  
4 and students. Was there an agreement here as to the  
5 annotation?

6 MR. POWERS: No. Condition I said, Your Honor. It  
7 was not an agreement, it was a condition of the release of  
8 the transcript.

9 THE COURT: But was it agreed to, the condition  
10 upon release of the transcript?

11 MR. POWERS: Apparently not.

12 THE COURT: That's why we're here.

13 MR. POWERS: Well, the transcripts were not  
14 released. They were only going to be released on the  
15 condition and therefore --

16 THE COURT: Well, you withdraw the hold on them so  
17 they can be released and will be released, as I understand  
18 it, except they will have the notation on it?

19 MR. POWERS: Consistent with Section 15.1.

20 THE COURT: That's right. And will be released,  
21 can be released if requested but with the notation.

22 MR. POWERS: Right. And my understanding is  
23 they've already been annotated as of June 11th. That was the  
24 communication from Mr. Nestor.

25 THE COURT: I'm sorry, they've already been what?

1 MR. POWERS: Annotated.

2 THE COURT: I know they were annotated, but when  
3 were they annotated?

4 MR. POWERS: June 11. The hold was April 21st.

5 THE COURT: Okay. And as of June 11th it was  
6 changed and annotated. Now then wouldn't this be the request  
7 for a preliminary injunction, wouldn't this be prohibitory?

8 MR. POWERS: Absolutely, Your Honor.

9 THE COURT: Pardon me?

10 MR. POWERS: Absolutely.

11 THE COURT: Prohibitory not mandatory?

12 MR. POWERS: Mandatory. I'm sorry, I misheard you.  
13 It's a mandatory injunction.

14 THE COURT: But it existed prior to June 11th in a  
15 certain form.

16 MR. POWERS: What they're asking you to do, Your  
17 Honor, is to remove the annotation and that's commanding an  
18 affirmative act. They're asking you to order the University  
19 to change something that's already done.

20 THE COURT: Depends on when the status quo was.  
21 When was the status quo status here?

22 MR. POWERS: June 11.

23 THE COURT: Why was June 11th the status quo?

24 MR. POWERS: That's when the transcripts were  
25 annotated.

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1           THE COURT: I understand that. But that wasn't  
2 when the proceeding began, it wasn't when the issues became  
3 in conflict.

4           MR. POWERS: The status quo is established as of  
5 the time of the request for the injunction, Your Honor, at  
6 the time the plaintiff requests the injunctive relief.

7           THE COURT: And you disagree with that?

8           MS. FELTER: A couple of things, Your Honor. First  
9 of all, Mr. Nestor did not say that the transcripts are held  
10 in every case. He absolutely did not say that. His  
11 affidavit says that they're held in cases where suspension is  
12 authorized.

13          THE COURT: Aside from that, your position is --

14          MS. FELTER: So the fact of the matter is, if  
15 somebody is going -- the two references in the website to,  
16 you know, the ability of the University to do this, there are  
17 notes in the website. If anybody wants to know what the  
18 school's policy is based on conduct proceedings, they look to  
19 the policy in the conduct handbook which says that the  
20 transcripts will be held if there is a Title IX violation.  
21 So that's the first thing.

22          The second thing is --

23          THE COURT: Counsel, whether or not you agree as to  
24 the status quo beginning the date.

25          MS. FELTER: I don't.

1 THE COURT: The date the preliminary injunction was  
2 filed.

3 MS. FELTER: I don't. And the Section 15.1 that he  
4 is referring to isn't even applicable here, because this says  
5 a student who chooses to withdraw from the University rather  
6 than participate in the conduct process may be classified as  
7 having withdrawn for disciplinary reasons. That is  
8 absolutely not what happened here. These students have all  
9 gone --

10 THE COURT: I'm trying to focus you both on one  
11 thing. Before you go any further, I got to know which  
12 standard to apply; whether it's a prohibitory injunction  
13 you're requesting or mandatory. And before I can do that  
14 I've got to know what the status quo is, when it attaches.  
15 So I need to have that issue further briefed by both of you,  
16 because you're not focusing on that. You're going on to the  
17 merits.

18 MS. FELTER: Our position would be the status quo  
19 was established when the University decided to hold the  
20 transcripts, and even if you assume for the sake of argument  
21 that they have the right to do that, they are changing the  
22 status quo by releasing the transcripts now to them with a  
23 notation on there. And contrary to what Mr. Powers said,  
24 there was no -- the e-mail that came to the students did not  
25 state that there was a condition that they could get their

1 transcripts. It wasn't an offer for them to get the  
2 transcripts if they accepted the condition, it was simply a  
3 directive.

4 Because the University has found you guilty of  
5 these charges, we're marking your transcripts, period. There  
6 was no opportunity for the students to engage in acceptance  
7 of that. So the fact of the matter is that the University  
8 changed the status quo on June 11th by marking the  
9 transcripts.

10 THE COURT: Mr. Powers, the status quo begins when  
11 the preliminary injunction motion was filed?

12 MR. POWERS: Yes, Judge. Under the Second Circuit  
13 standard to determine whether it's prohibitory or mandatory  
14 by what relief is being requested. If you're being asked to  
15 order something to happen, an affirmative act --

16 THE COURT: I understand that. What is your  
17 position as to when the status quo attaches?

18 MR. POWERS: It attaches as of the filing of the  
19 request for preliminary relief.

20 THE COURT: When was that filed?

21 MS. FELTER: That was filed on the 13th.

22 THE COURT: Of June?

23 MS. FELTER: Of June.

24 THE COURT: And the notations were put on the 6th  
25 of June, is that correct?



1 MR. POWERS: The 11th, I believe.

2 THE COURT: The 11th of June?

3 MR. POWERS: It was certainly before the filing.

4 MS. FELTER: But we had no way of knowing that the  
5 transcripts were already marked at the time, the University  
6 didn't provide that information to the students, so --

7 THE COURT: That isn't the point. The point is  
8 when the status quo is attached before I can decide which  
9 standard to apply. And it is a heavier burden on the  
10 standard for mandatory injunction, is a difficult burden, and  
11 certainly is easier to make a ruling on that than it is on  
12 the other one. I need to have maybe some further briefing on  
13 that. And anything else we want to get into? That's what I  
14 got stuck on when I was going through the papers here.  
15 Mandatory is a difficult burden, I don't think you're going  
16 to make that. Mandatory is close, but I need to know what is  
17 the status quo that we're talking about.

18 MS. FELTER: As I said at the beginning, to clarify  
19 and just to put a point on it is that our position is that  
20 the University, given what we got in opposition to this  
21 motion, we realized that the fact that there is a possibility  
22 that the mandatory standard would apply is only the case  
23 because of the action that the University took. They have  
24 prevented us from applying for a prohibitory injunction  
25 because they didn't notify the students they were taking this

1 action before they did, so they changed the status quo.

2 THE COURT: I understand there is a change in the  
3 status quo. But the filing of the injunction for preliminary  
4 injunction, it depends upon what the status quo is you're  
5 trying to preserve, that's what I'm trying to figure out  
6 first.

7 MS. FELTER: I guess my point is I don't know why  
8 the University would get the benefit of changing the status  
9 quo without advising anybody and then be able to turn around  
10 and argue, well, the status quo is changed so you have to  
11 meet this higher standard.

12 THE COURT: All right. Anything further?

13 MR. POWERS: Judge, I'm prepared -- I know you want  
14 briefing on which standard applies. I don't think the lesser  
15 standard applies, I'm prepared to argue that as well. But  
16 there is no entitlement to relief here. What they're  
17 requesting, to be able to transfer as if nothing had  
18 happened, they haven't demonstrated that they have that right  
19 to begin with. It's certainly not consistent with the  
20 evidence in front of you.

21 Not just Mr. Nestor's testimony, but also these  
22 corroborating references in other places in the policy. The  
23 University's policy's not just set forth in the disciplinary  
24 code, it exists in all published documents by the University  
25 that are provided to students so that they know what rules

1 they're being held to. This academic hold on the transcripts  
2 is something that routinely occurs, there is no evidence to  
3 the contrary. There is no bad faith here either, by the way.

4 THE COURT: All right. By the way, we haven't  
5 addressed public interest. Is there any need for either side  
6 to argue that point, you think, either of you?

7 MS. FELTER: I think it goes back to what I just  
8 said about Section 15.1. I mean, the University claims that  
9 the policy of holding transcripts and all of this has to do  
10 with preventing students from absconding from the  
11 disciplinary process. And the fact of the matter is, that  
12 they went through the disciplinary process. You know, they  
13 submitted themselves to it and the University is delaying the  
14 finality of that process and preventing them from applying to  
15 a state court for Article 78 relief and injunctive relief.

16 So they're caught between a rock and a hard place  
17 here. So as far as the University's public policy, public  
18 interest, I suppose, in making sure that the students go  
19 through the disciplinary process, that's happened.

20 THE COURT: Well, it's a relatively new  
21 requirement, as you know, of preliminary injunction. But  
22 whether or not the interest is in the interest of the public,  
23 we need to probably add that into your additional briefing by  
24 both sides. But I need to hear more about the status quo,  
25 whatever you have on that.

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27

1 I will give you something by Monday, and if I need  
2 further argument, then I'll take it, but I think we'll  
3 probably have enough to make a decision the following day.  
4 Monday enough time? Can you get it in on Monday?

5 MS. FELTER: Yes.

6 THE COURT: Get it in on Monday and we'll get it to  
7 you. Anything further you want to put on the record?

8 THE CLERK: Court is adjourned.

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C E R T I F I C A T I O N

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